Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE SCOTTISH HERITABLE TRUST, PLC and SHT HOLDINGS (US), INC.,

Petitioners,

v.

PEAT MARWICK MAIN & CO. and KPMG PEAT MARWICK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 1991 amendments to Rule 50 preclude a ruling that a defendant complied with the requirement of moving for judgment as a matter of law at the close of all the evidence when defendant (1) objected to the sufficiency of the evidence on specific grounds both in its jury charge objections and in an unrecorded charge conference; (2) asked that the issues not be submitted to the jury; (3) had objected to the sufficiency of the evidence on specific grounds before and during the trial; and (4) during its jury charge objections, renewed its prior motion for judgment as a matter of law and its summary judgment motion.

2. Whether a court of appeals' *Erie* analysis on an issue of state law not previously addressed by either the state's highest or intermediate courts was proper where the court of appeals had before it all relevant authorities, and these authorities provide support for the court's conclusion.

LIST OF PARTIES TO PROCEEDING PURSUANT TO RULES 14.1(b) AND 29.6

Pursuant to Supreme Court Rule 14.1(b), Respondents certify that the names of all parties to this proceeding appear in the caption of the Brief of Respondents, except that Respondents' name has changed since the time of trial to KPMG Peat Marwick LLP.

Pursuant to Supreme Court Rule 29.6, Respondents are not corporations and have no parent companies or nonwholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Peat Marwick Main & Co. and KPMG Peat Marwick respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's judgment in this case. The Fifth Circuit's opinion is reported at 81 F.3d 606 (5th Cir. 1996).

STATEMENT OF JURISDICTION

SHT asserts jurisdiction pursuant to 28 U.S.C. § 1254(1). As stated below, the decision of the court of appeals in this case does not create any conflicts and does not meet the criteria of Supreme Court Rule 10 for granting a writ of certiorari.

STATEMENT OF THE CASE

SHT's "Statement of the Case" is an exercise in advocacy advancing an unfounded version of the "facts." Some of the "facts" in SHT's argumentative discussion are simply wrong; in other places, the statements made to this Court are extremely misleading.

Unlike SHT's Statement of the Case, the first four pages of the Fifth Circuit's opinion contain a full and fair presentation of the relevant facts. (81 F.3d 607-10) The appellate court's factual discussion is incorporated herein by Peat Marwick in its entirety.

In this Response, Peat Marwick will correct certain of Petitioners' factual misstatements, but will not address all of them as many are immaterial to the issues before this Court.

A. Course of Proceedings Below

Petitioners Scottish Heritable Trust, PLC, a British conglomerate with a history of corporate acquisitions, and its wholly owned subsidiary SHT Holdings (U.S.), Inc. (collectively "SHT") sued the U.S. accounting partnership of Peat Marwick Main & Co. and its successor KPMG Peat Marwick (collectively "Peat Marwick") in connection with SHT's purchases of the stock of Rangaire Corporation ("Rangaire"), a publicly-traded company for which Peat Marwick was the independent auditor. SHT bought approximately 50% of Rangaire's stock in a series of purchases. SHT asserted that the initial August 1988 purchase was made in reliance upon Rangaire's July 31, 1987 audited financial statements and that it relied on Rangaire's July 31, 1988 audited financial statements in making the subsequent purchases. When Rangaire later experienced losses while under SHT's management, SHT sued Peat Marwick claiming that the net book value of Rangaire's fixed assets was overstated in the 1987 and 1988 financial statements audited by Peat Marwick. Peat Marwick prevailed on all the federal securities law claims submitted to the jury; SHT's jury verdict was based on a pendent claim of negligent misrepresentation under Texas state law.

B. Background Regarding Negligent Misrepresentation Cause of Action

In its Petition, SHT states that Rangaire retained an investment banker to sell the company in 1985, that Peat Marwick knew of the continual search for a buyer since that time, and that Rangaire remained on the market until

purchased by SHT in 1988. (Petition,[1] p. 2) To the contrary, the record shows (as the Fifth Circuit noted) that Rangaire retained an investment banker to sell the company in 1985, but those efforts were unsuccessful and the company instead conducted a tender offer in 1986 in which its Employee Stock Ownership Plan purchased stock from Rangaire's stockholders. (81 F.3d at 608) In fact, SHT's representatives testified that when they had approached Rangaire about purchasing some stock in the summer of 1988, Rangaire's CEO initially rebuffed them and stated that, in the CEO's view, Rangaire was not for sale. (R15:109) Further, there is no evidence that – had Rangaire actually been for sale after 1985 – Peat Marwick knew anything about it. The only evidence Rangaire was for sale after 1986 was testimony from one of its plant supervisors located in another state who testified that potential purchasers had toured his plant from 1985 forward, but his testimony made clear that Peat Marwick was not aware of any such visits. (81 F.3d at 608; R29:272-73) Finally, Rangaire never was "sold" as contemplated in 1985; SHT merely acquired the stock of Rangaire's principal stockholder Eugene Roberts and later bought more stock in open-market purchases.

SHT also states that "Peat Marwick knew that [Rangaire's] audited statements would be relied upon by the investing public in a purchase of the Roberts stock." (Petition, p. 3) To the contrary, Peat Marwick's 1987 audit report on Rangaire's financial statements was issued in October 1987. (81 F.3d at 608) Roberts did not file for

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[1] SHT's Petition for Writ of Certiorari in this Court is referred to as the "Petition." The volumes of the record will be referred to as, *e.g.*, (R10:121) (Record Volume 10, p. 121).

bankruptcy until December 1987.[2] (*Id.*) There is no evidence that Peat Marwick was aware at the time of its October 1987 report that Roberts would be filing for bankruptcy. In fact, Peat Marwick's most current information on Roberts' finances was that Roberts had received $5 million from the Rangaire tender offer just a year before. (R40:23-26) It was also undisputed that SHT's negotiations to purchase Rangaire stock from Roberts were not known by Peat Marwick until after SHT agreed to buy the stock. (81 F.3d at 608) Similarly, Peat Marwick had no knowledge of SHT's subsequent purchases of Rangaire stock before the purchases occurred. (*Id.* at 609)

SHT's Petition also misleads the Court by suggesting that SHT did not learn of alleged accounting problems at Rangaire or begin its own investigation until "the Summer of 1989," at which time it had completed its stock purchases. (Petition, p. 4) This statement is contradicted by the undisputed facts:

> Well in advance of SHT's second stock purchase [in September and October 1988], Garland, SHT's CEO, learned of and was concerned by questionable accounting practices which had the effect of inflating the book value of Rangaire's fixed assets.

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[2] Another example of SHT's misleading statements is its assertion that subsequent to Roberts' bankruptcy filing, "*Rangaire* retained an investment banker to arrange for a sale of, *at the very least*, the Roberts stock." (Petition, p. 3; emphasis added). The investment banker was hired by Roberts' bankruptcy trustee and not Rangaire, and there is no evidence whatsoever he had authority to attempt to sell anyone else's Rangaire stock. (R49:217-21)

. . .

> Concerned that this might be the "tip of the iceberg," Garland directed Robert Elliot – a partner with SHT/PLC's English auditors, Moores & Rowland – specifically to investigate, among other things, the fixed assets on Rangaire's books. (81 F.3d at 615, 608)

The Fifth Circuit went on to note that Elliot's confidential report to SHT's CEO, which was completed on September 20, 1988, contained an action recommendation to obtain appraisals of Rangaire's fixed assets but it "apparently was not heeded as SHT took no immediate action on this matter." (*Id.* at 609) Thus, SHT made its later purchases of Rangaire stock only after (1) the fixed asset issue had surfaced, (2) it had commissioned its own accountant to investigate and report on this issue, and (3) its officers had become members of Rangaire's Board of Directors with "access to Rangaire's internal financial records" and all "detailed financial data." (*Id.* at 608)[3]

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[3] There are many other "facts" relating to the merits of SHT's claims that the record does not support or directly contradicts. These include SHT's assertions that Hill "exercised complete domination" over Rangaire's accounting systems, that Hill began to "cook the books" of Rangaire in 1985, that Rangaire was only "marginally profitable," that Rangaire was "forced" to make the 1989 accounting writeoff, and that the result of the writeoff was "catastrophic." (Petition, pp. 2, 3, 4) The inventory test count (Petition, p. 3) related to an immaterial portion of the overall inventory in a subsequent year. (R40:173-77) These allegations were central to SHT's securities fraud claim, which the jury resolved in Peat Marwick's favor. Moreover, the Fifth Circuit expressed grave doubts as to whether the writeoff caused SHT any damage whatsoever, much less the purported "catastrophic" result, when it

C. Background Regarding Rule 50 Arguments

After the completion of discovery and before trial began, Peat Marwick moved for summary judgment on all of SHT's pending claims. (R5:1102-72) This motion, which was fully briefed, was denied on the eve of trial. At the close of SHT's case, Peat Marwick moved for judgment as a matter of law on all counts. (R36:185-87, 194-96) The motion was based, as SHT acknowledged, on many of the same grounds presented in Peat Marwick's summary judgment motion. (R36:188) The trial court denied the motion for judgment. In its ruling, however, the trial court stated that it would consider further the individual counts between that time and the time the charge was prepared and leave out counts at that stage if necessary. (R36:196)

At the specific moment in time all the evidence closed, the motion for judgment was not renewed; however, Peat Marwick effectively made such a motion by challenging the sufficiency of the evidence in several ways before submission of the case to the jury. That night, the district judge conducted a lengthy unrecorded charge conference that lasted approximately 4½ hours. As a result of that conference, SHT withdrew two of its claims and the trial court "directed out" a third claim. (R52:54) Peat Marwick then made objections to the jury charge on various grounds, including the sufficiency of the evidence on the two substantive points upon which the Fifth

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stated that Peat Marwick's loss causation arguments had "considerable merit." (81 F.3d at 615)

Circuit ultimately focused.[4] (R52:8-9) During these objections, Peat Marwick specifically renewed its prior motions for judgment as a matter of law and for summary judgment. Counsel for SHT acknowledged during the charge objections that the objections were consistent with the discussion that had taken place at the charge conference. (R52:10-11)

The jury subsequently found for Peat Marwick on the federal securities claims but found in favor of SHT on the pendent claim of negligent misrepresentation under Texas law, and awarded SHT $8,500,000. Peat Marwick renewed its motion for judgment as a matter of law in its motion for judgment notwithstanding the verdict. (R9:2157) SHT moved to strike that motion, alleging that Peat Marwick had failed to comply with Rule 50(a). (R10:2231) The trial judge denied the motion to strike, and granted in part and denied in part the JNOV motion, reducing the judgment to $4,725,000. (R10:2327) SHT did not make a subsequent Rule 50(c)(2) motion for new trial.

Both sides appealed to the Fifth Circuit. The Fifth Circuit denied SHT's cross-appeal. As to Peat Marwick's appeal, the Fifth Circuit held that, as a matter of law, (1) SHT failed to prove a negligent misrepresentation cause of action against Peat Marwick with regard to the first

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[4] For example, in its charge objections, Peat Marwick argued that the negligent misrepresentation claim "should not be submitted to the jury" in part because "[p]laintiffs have failed to prove and are simply not in a limited class." (R52:9) Earlier, in its motion for summary judgment, Peat Marwick argued that "[p]laintiffs have failed to demonstrate that they fall within the limited group of persons entitled to recover [for negligent misrepresentation]." (R5:1149)

stock purchase because SHT was not a member of any "limited group" and (2) SHT did not justifiably rely on the audited financials for the subsequent stock purchases.[5] The Court of Appeals reversed the trial court's judgment and rendered judgment for Peat Marwick. SHT did not file a petition for rehearing or request a new trial.

Before ruling on the merits, the Fifth Circuit addressed the question of whether Peat Marwick had complied with Rule 50. In considering this question, the Fifth Circuit decided that the trial court's determination that Peat Marwick had complied with Rule 50 was correct, "after reviewing the record in minute detail." (81 F.3d at 610) The Fifth Circuit also considered Rule 50(a)(2) as amended and held Peat Marwick had complied with that rule. (*Id.* at 611 n.14)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE IS NO TRUE CONFLICT BETWEEN THE CIRCUITS AND THE GRANTING OF A WRIT WOULD BE PREMATURE

A. SHT's Question on the Rule 50 Issue is Too Broad

The standard by which this Court determines whether to grant a petition for writ of certiorari is whether there are "compelling reasons" for granting the

[5] The Fifth Circuit also noted that several other issues raised by Peat Marwick and not made the basis of the court's decision, such as loss causation and damages, had "considerable merit." (81 F.3d at 615)

writ. Sup.Ct.R. 10. In an effort to make the question in this case appear "compelling," SHT claims that a significant conflict exists between the circuits concerning Rule 50's requirement that a motion for judgment be made at the close of all the evidence as a prerequisite to a post-verdict motion for judgment. To try to create that supposed conflict, SHT defines its first question in an inappropriately broad fashion which is not supported by this record, and then states this is an important question which affects "every civil jury trial in the United States District Courts. . . . " (Petition, p. 6) The actual Rule 50 question presented by this case is quite narrow and would affect only those rare cases involving virtually identical factual circumstances.

B. The Rule 50 Question is Narrow and There is No Conflict on That Narrow Issue

The true question in this case is whether a defendant complies with Rule 50 when, after the close of all the evidence, that party raises sufficiency of the evidence challenges in its objections to the charge and also renews its motions for directed verdict and for summary judgment but does not formally nominate these actions as a "motion for judgment." There is no conflict between the circuits on this question.[6]

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[6] Virtually every other circuit has previously excused, in appropriate circumstances, the fact that a formal motion for judgment was not made at the precise time the evidence closed. *See, e.g., Beaumont v. Morgan*, 427 F.2d 667, 670 (1st Cir.), *cert. denied*, 400 U.S. 882 (1970); *Bayamon Thom McCann, Inc. v. Miranda*, 409 F.2d 968, 970-72 (1st Cir. 1969); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 61-62 (2d Cir.), *cert. denied*, 488

Prior to the 1991 amendments to Rule 50, at least four circuits specifically permitted sufficiency of the evidence objections made either in the charge conference or during the charge objections to serve as a Rule 50 motion for directed verdict. *Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987); *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1401 (5th Cir. 1986); *Villanueva v. McInnis*, 723 F.2d 414, 416-18 (5th Cir. 1984); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3rd Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *Albrecht v. Herald Co.*, 452 F.2d 124, 127 (8th Cir. 1971).

Since the 1991 amendments, only the Fifth Circuit has squarely addressed the question of whether charge objections can act as a motion for judgment as a matter of law. However, the Third Circuit has explicitly reiterated its

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U.S. 852 (1988); *Mosley v. Cia. Mar. Adra, S.A.*, 362 F.2d 118, 121-22 (2nd Cir.), *cert. denied*, 385 U.S. 933 (1966); *Repola v. Morbark Indus. Inc.*, 934 F.2d 483, 488-89 (3rd Cir. 1991); *Acosta v. Honda Motor Co. Ltd.*, 717 F.2d 828, 831-32 (3rd Cir. 1983); *Singer v. Dungan*, 45 F.3d 823, 827-28 (4th Cir. 1995); *Miller v. Premier Corp.*, 608 F.2d 973, 979 n.3 (4th Cir. 1979); *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474, 477-78 (6th Cir.), *cert. denied*, 498 U.S. 855 (1990); *Boynton v. TRW, Inc.*, 858 F.2d 1178, 1184-86 (6th Cir. 1988); *Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 575-77 (7th Cir. 1976); *Moran v. Raymond Corp.*, 484 F.2d 1008, 1010-14 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 197-98 (8th Cir. 1995); *Albrecht v. Herald Co.*, 452 F.2d 124, 127 (8th Cir. 1971); *Bachtel v. Mammoth Bulk Carriers*, 605 F.2d 438, 441-42 (9th Cir. 1979), *judgment vacated on other grounds*, 451 U.S. 978 (1981); *Anderson v. United Telephone Co.*, 933 F.2d 1500, 1503-04 (10th Cir.), *cert. denied*, 502 U.S. 940 (1991); *Trujillo v. Goodman*, 825 F.2d 1453, 1455-56 (10th Cir. 1987).

prior rule since the amendments, which is that "[a]n objection to a jury charge can serve as a predicate for a later Rule 50(b) motion only if the district court explicitly treated the objection as a Rule 50(a) motion." *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, No. 93-5777, ___ F.3d ___, 1996 WL 344922 at *16 (3rd Cir. June 20, 1996) (deciding the test was not met under the facts of the case and further finding charge objections did not raise the issue later presented). Since the amendments, the First Circuit has also held that a discussion with the court in chambers at the end of the evidence can serve as a motion for judgment as a matter of law. *Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995). In recent cases involving the amended rule, other circuits have also permitted deviation from the strict application of Rule 50 that SHT urges. *See Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 197-98 (8th Cir. 1995); *Singer v. Dungan*, 45 F.3d 823, 827-28 (4th Cir. 1995).

Peat Marwick has not found any cases – either before or after the rule amendments – that reject the general principle that objections to the charge or discussions conducted during charge conferences can, at least under some circumstances, serve as a motion for judgment. The cases that SHT cites in support of its supposed conflict do not deal with this particular issue. *See* Petition, pp. 15-18; *Umpleby v. Potter & Bromfield*, 69 F.3d 209, 212 (7th Cir. 1995) (motion for judgment at close of plaintiff's case, but not renewed at close of all evidence); *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1286-87 (7th Cir. 1995) (no motion for judgment at close of evidence and no mention of motion any time prior to the verdict); *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995) (particular ground on which judgment sought not mentioned

prior to verdict); *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1139-1140 (7th Cir. 1994) (party precluded from seeking judgment n.o.v. because of failure to renew motion for judgment at close of evidence).

When the Fifth Circuit's actual holding in this case is considered, there is no conflict between the circuits. The Fifth Circuit's holding is entirely in accord with the decisions of all of the other circuits which have considered this issue. This Court has held "it is very important" that it be consistent in not granting certiorari in conflict situations except "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). That is not the case here.

C. There is No Conflict Even With Regard to the Broad Question SHT Poses

There is no conflict between the circuits even when the question posed by SHT, which is not presented by this case, is examined on the merits. SHT cites no case discussing actual conflicts between the circuits, as opposed to minor differences concerning the application of Rule 50 in a variety of factual circumstances.

Prior to the 1991 amendments, the Seventh Circuit appears to have been the most generous of the circuits in forgiving a party's failure to move for directed verdict at the close of all the evidence. *See, e.g., Benson v. Allphin*, 786 F.2d 268, 273-74 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) (stating that Rule 50 is not strictly enforced provided that the failure to renew the motion for directed

verdict did not "unduly prejudice his opponent"). Unquestionably, the Seventh Circuit has reacted to the 1991 amendments by reining in its own expansive standards with regard to Rule 50. *See, e.g., Umpleby v. Potter & Bromfield*, 69 F.3d 209, 212 (7th Cir. 1995). However, it has done so only in circumstances where it was clear that no pre-submission motion or any facsimile thereof was made at any time after the evidence closed. (*See* pp. 11-12, *infra*) The Seventh Circuit has not stated that nothing less than a formal, officially-designated motion for judgment at the precise moment all the evidence closes will suffice as a Rule 50 motion.

SHT also argues that the District of Columbia Court of Appeals is in conflict with the Fifth Circuit's opinion in this case. Petition, pp. 17-18; *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995). There is no such conflict. The D.C. Circuit has only stated that the issue raised in the post-verdict motion for judgment n.o.v. must have been made in the pre-submission motion for judgment, relying on authority from nearly ten years before the 1991 amendments. That circuit's contribution to the alleged "conflict" is merely that it cited to and quoted from the Advisory Committee Notes to the 1991 rule amendments.

Indeed, the apparent "conflict" upon which SHT relies is with the Advisory Committee Notes to the rules, and not a conflict between the courts of appeals. This Court's rules and opinions, however, emphasize the need for a conflict between the courts of appeals. Sup.Ct.R. 10; *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). Even the alleged conflict with the Advisory Committee Notes is highly questionable. The Notes cited by SHT did not address Rule 50(b), which is the only rule that mentions renewal of a motion for judgment as a matter of law

"made at the close of the evidence." The Notes only comment upon the second sentence of new Rule 50(a)(2) with its requirement that the party moving for judgment articulate the factual and legal basis for the motion. Rule 50, Advisory Committee Notes, 1991 Amendment. Because of its limited nature, the Note itself is far too amorphous to create a conflict.

D. It Would be Premature for This Court to Consider the Rule 50 Issue

Another reason there is no conflict is that the Rule 50 question, even as framed by Petitioners, involves amendments to the rules that were adopted only as recently as 1991. By the time cases were tried under those new rules, courts of appeals were not interpreting them until two or three years after the amendments were adopted. At this point, there are few circuit opinions applying the 1991 amendments in any context. Consequently, it would be premature to grant a petition for writ of certiorari at this juncture. As this Court has written, it "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955); *accord, McCray v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J.) (denying certiorari where there presently was no conflict of decision in the federal system because "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date").

E. Conclusion

There is no conflict between the courts of appeal on the Rule 50 issue, either as the issue is stated by SHT or on the more accurate question Peat Marwick has presented. Furthermore, it is much too soon after the 1991 amendments to Rule 50 to speculate whether any serious conflict will develop between the courts of appeal concerning those rule changes. For these reasons alone, this Court should deny the petition. There are, however, additional reasons discussed below as to why the Court should refuse to grant certiorari.

II. THE FIFTH CIRCUIT'S DECISION ON THE RULE 50 ISSUE IS FACT AND CASE SPECIFIC AND IS THE CORRECT DECISION

A. The Decision on the Rule 50 Issue is Fact and Case Specific

In this case, there was a 4½ hour charge conference with the district court, and objections to the charge were made after the close of all the evidence and before the case was submitted to the jury. This is the time during the trial when a party would be expected to make a formal motion for judgment as a matter of law. Moreover, in the course of presenting its objections to the charge, Peat Marwick specifically raised its sufficiency objections and stated that it was "renewing" its prior motion for directed verdict and its motion for summary judgment. On this basis, Peat Marwick complied with Rule 50 without the necessity of reliance on any exceptions to that rule.

The trial court treated the discussion that occurred at the charge conference as addressing the sufficiency of the evidence to submit SHT's causes of action to the jury. Over SHT's objections, it dismissed one of SHT's claims at that juncture. (R52:54) SHT obviously also treated the charge conference as addressing the sufficiency of the evidence. As a result of the discussions that took place at that conference, SHT withdrew two of its causes of action and its request for punitive damages. (R52:3) The subsequent jury charge objections clearly raised sufficiency issues.

Following the jury's verdict, Peat Marwick filed a motion for judgment notwithstanding the verdict in which it renewed its motion for judgment as a matter of law. SHT responded to that motion with a motion to strike, asserting that Peat Marwick had not filed a motion for judgment as a matter of law at the close of all the evidence. In that motion, SHT raised the same arguments that it urges in its Petition to this Court. Moreover, in pressing its motion to strike, SHT conceded that certain issues (including the two issues on which the Fifth Circuit subsequently ruled) had been raised by Peat Marwick in both the charge conference and the objections to the charge. (R10:2300) The trial judge, who participated in the charge conference and heard the objections, denied SHT's motion to strike and granted the motion for judgment n.o.v. in part. In essence, the trial judge – who had knowledge of what had transpired before the case was submitted to the jury – agreed that Peat Marwick had complied with Rule 50.

This case is very fact-intensive. Peat Marwick's challenge to the sufficiency of Petitioners' evidence was detailed and extensive. Neither the Fifth Circuit's nor the

trial court's decision turns on a generalized rule of law, but on the specifics of who said what and when. This case is one in which this Court, rather than being free to consider broader points of law, will be mired in the record and the nuances of what the trial participants said and meant. The Fifth Circuit arrived at its conclusion that Peat Marwick had complied with Rule 50 after "reviewing the record in minute detail." (81 F.3d at 610) This Court does not "sit for the benefit of the particular litigants" nor does it take cases with only "isolated significance." *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 76 (1955). Yet that is precisely what this Court will be required to do if it takes this case.

B. The Fifth Circuit's Decision Is Correct

1. The Purposes of Rule 50 Were Fulfilled

The Fifth Circuit's decision in this case was the correct one. Courts and commentators agree that Rule 50(a) has twin purposes: to "(1) enable the trial court to examine all of the evidence before submitting the question to the jury; and (2) alert the opposing party to any defect in its case, thereby affording it an opportunity to cure any such defects." *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 n.8 (8th Cir. 1995); *see also* 5A James W. Moore, *Moore's Federal Practice*, ¶50.08, p. 50-88 (1995). There is no question in this case that the purposes of Rule 50 were met.

From the outset, Peat Marwick repeatedly lodged the same complaints concerning SHT's evidence that it raised in its post-verdict motion. For example, with respect to the limited group issue, Peat Marwick had previously raised its post-verdict arguments both in its motion for

summary judgment (R5:1102) and in its objections to the charge. (R52:8-9) Moreover, SHT agreed in its post-trial briefing that Peat Marwick had also raised the limited group issues in the charge conference. (R10:2300) The justifiable reliance issue was also raised both during the objections to the charge and, as SHT again admitted in its post-judgment briefing, during the charge conference. (R52:7; R10:2300)

The trial court obviously felt that it had adequate notice of Peat Marwick's challenges to the evidence because it denied SHT's motion to strike the motion for JNOV and, in fact, granted the JNOV motion in part. (R10:2332) And the reality is that, between the time the evidence closed and the time the jury commenced deliberations, Peat Marwick informed SHT of the very deficiencies of which Peat Marwick complained on appeal. SHT made no attempt to correct the deficiencies. When SHT attempted to argue to the trial court that it had not received adequate notice, the trial judge–who was there – rejected that argument.

2. The 1991 Amendments to Rule 50 Do Not Support SHT's Arguments

What SHT advocates is that a draconian level of strictness be read into Rule 50, when this rule has historically been construed to determine whether its purposes have been served.[7] In essence, SHT urges that a Rule 50

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[7] The historic construction is consistent with the general admonition that the federal procedural rules are to be "construed and administered to secure the just . . .

motion for judgment must be made in a ritualistic manner at a single precise moment to preserve sufficiency of the evidence arguments. There is no indication in the 1991 changes to Rule 50 that such a result was intended.

The Advisory Committee Notes to the 1991 amendments state that the courts of appeals should not use techniques to avoid requiring motions for judgment at the close of all the evidence such as was used in *Benson v. Allphin*, 786 F.2d 268, 272-275 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986). The Seventh Circuit's opinions, as demonstrated by *Benson*, reflected an excessively permissive approach to Rule 50. For example, in *Benson*, the Seventh Circuit forgave the defendant's failure to move for judgment at the close of all the evidence, even though there had been no preverdict attempt to renew a prior motion. In fact, the defendant did not even suggest that it would like to move for judgment until after the jury began deliberating; indeed, a motion was only made after the jury had determined the liability issue.

There is no indication from the express language of the Rule change that it was intended to eliminate every deviation from the making of a formal motion for judgment at the precise moment that the evidence closes. *See, e.g.*, 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2537, p. 335 (1995) (noting that the 1991 amendments to Rule 50 changed the terminology, but "[n]o change in the substance of the motion was intended by the amendment, however"). And the cases that the Seventh Circuit has decided since the rule

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determination of every action." Fed.R.Civ.P. 1; *see also* footnote 6, *supra*.

amendments do not address the question of what that circuit would do if the parties made the equivalent of a motion for judgment by telling the court during the charge conference and the charge objections that the evidence was insufficient for the case to be submitted to the jury. *Cf. Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987) (raising issue at instruction conference laid foundation for later post-verdict motion).

3. There is Ample Support for the Fifth Circuit's Decision on the Rule 50 Question

What the Fifth Circuit did in this case is supported by decisions from many of the various circuits. For a great number of years, the courts of appeals have permitted objections to the submission of claims to the jury, when based on the insufficiency of the evidence, to serve as a motion for directed verdict. *See, e.g., Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995) (discussion in chambers after close of evidence was functional equivalent of a motion for judgment as a matter of law); *Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987) (discussion at charge conference); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3rd Cir. 1984), *cert. denied*, 477 U.S. 908 (1986) (colloquy with district court concerning jury instruction suffices as motion for directed verdict if the district court treated it as such); *Albrecht v. Herald Co.*, 452 F.2d 124, 127 (8th Cir. 1971) (objections to proposed charge supported filing of motion for judgment n.o.v.); *see also National Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1548-49 (11th Cir. 1986) (renewal of motion for directed verdict at the beginning of the charge conference met requirements

of the rule); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1347 (9th Cir. 1986) (statement in dicta that "an objection to a jury instruction on the ground that insufficient evidence was presented on an issue to allow it to be submitted to the jury" may be a sufficient approximation of a motion for directed verdict).[8]

The Advisory Committee Notes to the 1991 rule changes also support the Fifth Circuit's holding in this case. After the discussion of the *Benson* case, the Notes specifically state: "The information required with the motion may be supplied by explicit reference to materials and argument previously supplied to the court." Rule 50, Advisory Committee Notes, 1991 Amendment. During its charge objections before the case was submitted to the jury, Peat Marwick specifically referred to and renewed its motion for summary judgment and its prior motion for directed verdict.

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[8] SHT cites to three cases from two different circuits that supposedly have refused to allow objections to jury instructions to serve as a substitute for a motion for directed verdict. Petition, pp. 19-20; *Lewis v. Kendrick*, 944 F.2d 949, 953 (1st Cir. 1991) (court requested motion in writing which was never filed); *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11-12 (3rd Cir.), *cert. denied*, 429 U.S. 966 (1976); *Mallick v. International Broth. of Elec. Workers*, 644 F.2d 228, 234 (3d Cir. 1981). The situation in each of those cases was that, under the particular circumstances of the case, the court held the objections would not substitute for the motion. None of those opinions held that charge objections *would never* suffice as a motion for directed verdict. Indeed, both of the cited circuits have held that either objections to the charge or conferences on the jury submissions can serve as a motion for directed verdict. *Simon v. Navon*, 71 F.3d 9, 14 (1st Cir. 1995); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814-15 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

4. Conclusion

There is ample support for the Fifth Circuit's conclusion that the purposes of Rule 50 were served in this case. Moreover, there is no legitimate conflict among the courts of appeals on this issue.[9] As a result, this Court should deny the petition for writ of certiorari.

III. THERE IS NO CONFLICT THAT WOULD PERMIT THE GRANTING OF A WRIT ON THE ISSUE OF THE FIFTH CIRCUIT'S *ERIE* ANALYSIS

Just as with the Rule 50 question, there is no conflict between the courts of appeals on SHT's question relating to the application of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Certainly, the Fifth Circuit did not pronounce any propositions of law that conflict with any statements of this Court or any other court of appeals. SHT asserts merely that the Fifth Circuit ignored a "well-established line of cases from the intermediate Texas appellate courts which govern the issue of limited class. . . . " (Petition, p. 20) SHT cited these Texas cases to the Fifth Circuit and the court found that they did not directly address the issue in this case. At bottom, the Fifth Circuit followed the correct *Erie* process and SHT is simply seeking another review of Texas law by this Court.

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[9] This case presents no Seventh Amendment issue. (Petition, pp. 13-14) To the extent that SHT is complaining about being deprived of a right to a jury trial, it waived that right when it failed to request a new trial either in the district court or in the court of appeals. *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967).

Moreover, if this Court took this case, it is unclear what general issues of the law it would be addressing, other than to reiterate the same well-established criteria for making *Erie* determinations the Court has already addressed. *E.g., Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 202-04 (1956). SHT's specific *Erie* question has significance only for the parties to this case. Since this Court does not "sit for the benefit of the particular litigants" or take cases with only "isolated significance," the *Erie* issue in this case is particularly inappropriate for this Court's attention. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 76 (1955).

IV. THE FIFTH CIRCUIT WAS THOROUGHLY JUSTIFIED IN MAKING ITS *ERIE* ANALYSIS IN THIS CASE

A. The Fifth Circuit's Approach Was Entirely Consistent With a Proper *Erie* Analysis

Petitioners' argument with respect to a purported divergence from *Erie* reveals a fundamental misunderstanding of the types of issues that merit this Court's consideration. Ever since *Erie* was decided, the lower federal courts have had to determine the status of state law on issues where state law controls. Not infrequently, they have had to do so in circumstances where the highest state court has not spoken to the particular issue. There is no disagreement about how such a determination is to be made: the federal court may consider "all of the available legal sources" to determine "issues of state law as it believes the highest court of the state would determine them." 19 Charles A. Wright, Arthur R. Miller

& Edward H. Cooper, *Federal Practice & Procedure*, § 4507, pp. 130, 191 (1996). These decisions are generally not subject to review by this Court:

> [O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts.

Huddleston v. Dwyer, 322 U.S. 232, 237 (1944).

Contrary to the suggestion made in the Petition, the question the Fifth Circuit faced in this case had *not* been decided by *any* Texas appellate court – including the four intermediate court decisions to which SHT repeatedly cites.[10] The question was whether, under Texas law, a potential investor in a publicly-held corporation with no previous connection to either the corporation or the accountant is within a "limited group" of persons who is entitled to rely upon the auditor's report in asserting a negligent misrepresentation cause of action under section 552 of the Restatement (Second) of Torts. While other Texas cases had discussed the negligent misrepresentation cause of action, none addressed that precise question.

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[10] In its "Reasons for Granting the Writ," SHT states that the Fifth Circuit "ignored the clear holdings of four Texas intermediate court cases on the issue of negligent misrepresentation," and that the Fifth Circuit "[failed] to abide by the holdings of the Texas courts. . . . " (Petition, p. 7) These statements are simply wrong. The Fifth Circuit correctly noted that "[t]he Texas courts have not had occasion to decide this particular aspect of the "limited group" requirement. . . . " (81 F.3d at 613)

The Fifth Circuit here did not deviate from the normal approach in making its "considered determination" of this issue under Texas law. It certainly did not "ignore" clear holdings of Texas intermediate courts, as Petitioners claim. The Fifth Circuit had before it all "available legal sources," namely, the Texas state appellate court opinions regarding Section 552 of the Restatement (Second) of Torts, which governs the tort of negligent misrepresentation in Texas, as well as the federal decisions addressing Texas negligent misrepresentation law and the Restatement itself. Because the Restatement has been adopted by many other jurisdictions in addition to Texas, it also considered other judicial decisions interpreting the Restatement. The court also had its own determination of the Restatement in *Rubinstein v. Collins*, 20 F.3d 160, 172 (5th Cir. 1994) (Texas law) and *First Nat'l Bank of Commerce v. Monco Agency Inc.*, 911 F.2d 1053, 1057-60 (5th Cir. 1990) (Louisiana law). There is absolutely nothing in the Fifth Circuit's thorough analysis that deviates from the standard and well-established judicial approach in these circumstances.

B. The Fifth Circuit's Conclusion on the Issue of Texas State Law Is Well Supported

The best indicators of how the Texas Supreme Court would address the question in this case are found in two different sources, both of which the Fifth Circuit took into account. First, the Texas Supreme Court had adopted Section 552 of the Restatement as the law of Texas with regard to negligent misrepresentation causes of action. *Federal Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex.

1991). The success of SHT's argument on its negligent misrepresentation claim depended on Texas law being "more expansive than the Restatement approach" to third-party liability. (81 F.3d at 612-14) However, since the time of SHT's cited appellate decisions, the Texas Supreme Court has adopted Restatement Section 552, not something different, as the law of the state. (*Id.* at 612)

Second, the closest that any of the Texas appellate courts had come to discussing the issue in this case was in *Cook Consultants v. Larson*, 700 S.W.2d 231, 236 (Tex. App. – Dallas 1985, writ ref'd n.r.e.). That case dealt with the potential liability of a surveyor to the property's purchaser, who the court found was the *only* potential user of the information. The court specifically contrasted the result in that case with an "unlimited class" of securities purchasers:

> Unlike, for example, future purchasers of shares of stock attempting to hold an accountant liable, [plaintiff] Larson is not a member of an unlimited class . . .

700 S.W.2d at 236 (citations omitted).[11]

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[11] The Fifth Circuit made a detailed analysis of Texas law, citing to cases that gave some guidance on the question it was deciding, including two of the four cases it is accused of ignoring. (81 F.3d at 612-14) It did not cite to two of the Texas appellate decisions because they were not helpful. *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App. – Fort Worth 1971, writ ref'd n.r.e.), dealt with an identified party relying on financial statements in a specific transaction, all known to the auditor in advance. *Hermann Hosp. v. National Standard Ins. Co.*, 776 S.W.2d 249 (Tex. App. – Houston [1st Dist.] 1989, writ denied), involved a misrepresentation made *directly* by the

One of SHT's chief complaints is that the Fifth Circuit examined the discussion of Texas law on this same issue contained in *In re Crazy Eddie Securities Litigation*, 812 F. Supp. 338, 359-60 (E.D.N.Y. 1993). SHT argues that the Fifth Circuit "heavily relied" on that case. To the contrary, the Fifth Circuit specifically acknowledged that *In re Crazy Eddie* had no binding effect on the court. (81 F.3d at 613)

Finally, SHT's arguments are founded upon a grave misunderstanding of Texas procedure. SHT argues that the Texas Supreme Court refused writs of error in three of the four Texas cases and, thereby, adopted those opinions as its own.[12] (Petition, pp. 29-30) This argument is incorrect. The history of three of these four cases in the Texas Supreme Court was "writ refused, no reversible error." Under the Texas Supreme Court's rules, this means that the Supreme Court was not satisfied that the court of appeals' opinion correctly stated the law in all respects, but there was no error that required reversal.[13]

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defendant insurance company to the plaintiff-hospital that a patient was insured. Liability to a third party was not even raised in *Hermann*.

[12] The means by which an appeal is taken to the Texas Supreme Court is by "application for writ of error." Texas Rules of Appellate Procedure 130. The Supreme Court's disposition of the writ, the case's "writ history," is significant under Texas procedure and therefore is noted in the citation.

[13] The fourth case, *Hermann Hospital*, was "writ denied," which meant that the Texas Supreme Court was not satisfied that the opinion declared the law correctly in all respects, but believed that reversal was not required *or* that the case was not of such importance to the state's jurisprudence as to require correction. The Appendix to this brief contains a table

(Appendix) In none of the four decisions did the Texas Supreme Court adopt the court of appeals' opinion as its own.[14]

The thrust of SHT's *Erie* argument is that it simply disagrees with the Fifth Circuit's decision, nothing more. It also makes clear that its success on the limited group argument relies very heavily on the assumption that the Texas Supreme Court would reject the Restatement and adopt an expansive "foreseeability" approach to the limited group requirement of the negligent misrepresentation cause of action. However, as the Fifth Circuit noted, one of the Texas intermediate cases "expressly declined . . . to adopt the foreseeability approach" (81 F.3d at 614) and the clear nationwide trend is to reject such an expansive test in the context of third-party liability for merely negligent misrepresentation. (81 F.3d at 611)

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explaining the meaning of the various writ dispositions by the Texas Supreme Court.

[14] This would only be true in those cases in which the Texas Supreme Court rules on the application with the notation "writ refused." None of the four cases relied upon by SHT are cases in which the application for writ of error was simply refused. In any event, if SHT were correct and had the Texas Supreme Court adopted the three opinions as its own, it means that *Cook Consultants'* statement that "future purchasers of shares of stock attempting to hold an accountant liable" are not members of any limited group would function as a statement of the Texas Supreme Court. Finally, this case does not create an intra-circuit conflict with the procedures approved in *Comer v. Texaco, Inc.*, 514 F.2d 1243, 1244 (5th Cir. 1975). *Comer* interpreted Louisiana, not Texas, appellate procedure.

The Fifth Circuit carefully analyzed Texas law and trends in Texas law and drew its conclusion concerning what the Texas Supreme Court would decide. It is not the function of this Court to waste its resources to determine whether the Fifth Circuit was correct in its determination of what the Texas Supreme Court would do. If there were ever a situation where this Court was being asked to take a case of "isolated significance," SHT's *Erie* question is it. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 76 (1955).

Finally, SHT's *Erie* argument is confined to the limited group issue. The justifiable reliance aspect of the court's decision is not contested. Further, the Fifth Circuit specifically noted at the end of its opinion that, had it not decided the case in Peat Marwick's favor on negligent misrepresentation and justifiable reliance, some of the other appellate issues raised by Peat Marwick – particularly damages and loss causation – also had "considerable merit." (81 F.3d at 615) This Court should not grant petitions for certiorari when alternative holdings make the question presented to this Court too abstract. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1958).

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX –

**Texas Rules of Form,
Tex. Law Rev. Ass'n
(8th ed. 1992),
Appendix A**

APPENDICES

APPENDIX A
TABLE OF NOTATIONS USED ON APPLICATIONS FOR WRITS OF ERROR

(From Gordon Simpson, *Notations on Applications for Writs of Error*, 12 TEX. B.J. 547, 574-75 (1949))
[Post-1949 information added]

Notation	Date[18]	Statute or Rule Defining Notation	Meaning
Refused [writ ref'd]	Sept. 1, 1892 to June 14, 1927	None. *Cf.* Acts 1892, 1st C.S., ch. 14, p. 20; Art. 943, R.S. 1895; Art. 1544, R.S. 1911; Art. 1746, R.S. 1925.	Supreme Court approved result reached by court of civil appeals but did not necessarily approve opinion. Brackenridge v. Cobb, 85 Tex. 448, 21 S.W. 1034 (1893); Fleming v. Texas Loan Agency, 87 Tex. 238, 27 S.W. 126 (1894). Refusal might not even mean approval of result reached, where error was not preserved and presented to Supreme Court. See Terrell v. Middleton, 108 Tex. 14, 17, 191 S.W. 1138, 1139 (1917).
	June 14, 1927 to present	Acts 1927, Reg. Sess., ch. 144, p. 214, amending Art. 1728, R.S.	Judgment of court of civil appeals correct and principles of law declared in opinion correctly determined. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 383-84, 110 S.W.2d 561, 565-66 (1937); Ohler v. Trinity Portland Cement Co., 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ) ("Since [June 14, 1927], a decision by a Court of Civil Appeals in which the Supreme Court refuses a writ of error[] is as binding as a decision of the Supreme Court itself.").
Refused for Want of Merit; Ref. Want Merit; Ref. W.M. [writ ref'd w.o.m.]	Sept. 1, 1941 to Feb. 1, 1946	Tex. R. Civ. P. 483.	Judgment of court of civil appeals correct but Supreme Court not satisfied that opinion in all respects has correctly declared the law.

[18]Date of Supreme Court's action on the application. See tables of cases reviewed, published in the *Texas Reports*, for exact date of action.

Notation	Date	Statute or Rule Defining Notation	Meaning
Refused, No Reversible Error; Ref. N.R.E. [writ ref'd n.r.e.]	Feb. 1, 1946 to Jan. 1, 1988	Tex. R. Civ. P. 483 (repealed 1986); TEX. R. APP. P. 133.	Supreme Court not satisfied that opinion of court of civil appeals in all respects has correctly declared the law, but is of the opinion that the application for writ of error presents no error which requires reversal.[19]
Dismissed; Dismissed for Want of Jurisdiction; dismissed WOJ [writ dism'd w.o.j.]	Sept. 1, 1892 to July 1, 1917	None. *Cf.* Acts of 1892, 1st C.S., ch. 15, § 5, p. 26; Art. 996, R.S. 1895; Art. 1591, R.S. 1911; Acts 1892, 1st C.S. ch. 14, p. 20; Art. 940, R.S. 1895; Art. 1521, R.S. 1911, and amending acts.	Lack of jurisdiction in Supreme Court to consider application. Examples: jurisdiction final in court of civil appeals, Burnett v. Powell, 86 Tex. 382, 24 S.W. 788, 25 S.W.17 (1894) (boundary suit), Gulf C.&S.F.R. Co. v. Buford, 85 Tex. 430, 21 S.W. 678 (1893) (amount in controversy), Meade v. Leon & H. Blum Land Co., 85 Tex. 513, 22 S.W. 514 (1893) (question of fact); defective application, Homes v. City of Henrietta, 91 Tex. 318, 42 S.W. 1052 (1897); application filed too late, Schleicher v. Runge, 90 Tex. 456, 39 S.W. 279 (1897); subject matter of controversy has ceased to exist, Robinson v. State, 87 Tex. 562, 29 S.W. 649 (1895); judgment of court of civil appeals not one which "practically settles the case," Gulf C.&S.F.R. Co. v. Riordan, 85 Tex. 511, 22 S.W. 514 (1892).
	July 1, 1917[20] to June 14, 1927	*Cf.* Art. 1591, R.S. 1911, and Acts 1917, Reg. Sess., ch. 75, p. 141, amending Art. 1521, R.S. 1911; Arts. 1728 and 1821, R.S. 1925.	Same as above, except extended to include cases otherwise within jurisdiction of Supreme Court where error committed, if any, was not "of such importance to the jurisprudence of the State as in the opinion of the Supreme Court required correction." Decker v. Kirlicks, 110 Tex. 90, 95-96, 216 S.W. 385, 386-87 (1919); National Compress Co. v. Hamlin, 114 Tex. 375, 385-86, 269 S.W. 1024, 1028 (1925).

[19]Prior to 1988, some commentators questioned whether the definition in Rule 483 of the "no reversible error" designation accurately or completely described its use in practice. Ted Z. Robertson & James W. Paulsen, *The Meaning (If Any) of an "N.R.E.,"* 48 TEX. B. J. 1306 (1985); *cf.* Frank M. Wilson, *Hints on Precedent Evaluation*, 24 TEX. B.J. 1037, 1089-91 (1961) (suggesting various clues to the reasons for a court's use of the *writ ref'd n.r.e.* designation in a particular case). In particular, it was suggested that the Texas Supreme Court's method of processing writ of error applications made *writ ref'd n.r.e.* a catch-all designation to which a specific interpretation—that the court was troubled by a certain aspect of the court of appeals' declaration of the law but satisfied with the disposition of the case—could not accurately be ascribed.

[20]The 1917 act provided that it should become effective on July 1, 1917, but that it should not affect business before the Supreme Court at that time. Records in the clerk's office indicate that applications filed after July 1, 1917, were not acted on by the Supreme Court until after January 1, 1919.

Notation	Date	Statute or Rules Defining Notation	Meaning
Dismissed; Dismissed for Want of Jurisdiction; Dismissed WOJ [writ dism'd w.o.j.] (continued)	June 14, 1927 to Mar. 1, 1939	Acts 1927, ch. 144, p. 214, amending Art. 1728, R.S. 1925; Art. 1821, R.S. 1925.	(1) Lack of jurisdiction in Supreme Court to consider application. See examples above. (2) In cases within jurisdiction of Supreme Court, judgment correct but Supreme Court not satisfied that opinion of court of civil appeals in all respects has correctly declared the law. Bain Peanut Co. v. Pinson & Guyger, 119 Tex. 572, 574-75, 34 S.W.2d 1090, 1091 (1931). (*Cf.* "Refused" prior to 1927.)
	Mar. 1, 1939 to present	Supreme Court Rule 5a, 131 Tex. v; Tex. R. Civ. P. 483; TEX. R. APP. P. 133.	Lack of jurisdiction in Supreme Court to consider application. See examples above. Wood v. Bankers Life & Loan Ass'n, 132 Tex. 505, 125 S.W. 2d 262 (1939).
Dismissed for Want of Jurisdiction—Correct Judgment; Dism. Judgm. Cor. [writ dism'd judgmt cor.]	Mar. 1, 1939 to Sept. 1, 1941	Supreme Court Rule 5a, 131 Tex. v.	In cases within jurisdiction of Supreme Court, judgment correct but Supreme Court not satisfied that opinion of court of civil appeals in all respects has correctly declared the law. Republic Ins. Co. v. Highland Park Indep. Sch. Dist., 133 Tex. 545, 125 S.W.2d 270 (1939).
Denied [writ denied]	Jan. 1, 1988 to present	Supreme Court Rule 133, 733 S.W.2d cxviii; TEX. R. APP. P. 133.	Supreme Court not satisfied that opinion of court of appeals in all respects has declared the law correctly, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the state as to require correction.[21]

[21]For an explanation of the formal distinction between "writ denied" and "writ ref'd n.r.e.," and possible practical considerations, see Elaine A. Carlson & Roland Garcia, Jr., *The New Discretionary Review Powers of the Texas Supreme Court*, 50 TEX. B.J. 1201 (1987).